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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

January 12, 2015

4:02 PM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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Telephone Conference, on the Record, Regarding Mack Claims
Objection

Pre-motion Conference by Telephone

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RESIDENTIAL CAPITAL, LLC, et al.

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1 P R O C E E D I N G S

2 THE COURT: All right. This is Judge Glenn. We're on
3 the record in Residential Capital, number 12-12020. This is a
4 case management conference regarding the ResCap Borrower Claims
5 Trust objection to claim number 386 filed by Barry and Cheryl
6 Mack.

7 May I have your appearances, please?

8 MR. LEWIS: Yes, Your Honor. Adam Lewis of Morrison &
9 Foerster for the ResCap Borrower Claims Trust.

10 THE COURT: Thank you.

11 MR. GARBER: And David Garber, Your Honor, on behalf
12 of the claimants, Barry and the estate of Cheryl Mack.

13 THE COURT: All right. Thank you very much to both of
14 you. Happy New Year to both of you.

15 MR. LEWIS: Thank you, Your Honor.

16 MR. GARBER: Thank you.

17 THE COURT: So Mr. Lewis, why don't you first give me
18 an update, from your perspective, on where things stand? Well,
19 I have your letter about wanting to make a partial summary
20 judgment motion, but we'll come to that, but why don't you
21 update me on status generally, okay?

22 MR. LEWIS: Sure, Your Honor. Discovery has closed;
23 it closed around Christmas, and I'm done with discovery. The
24 parties had a timely conference on experts, and each side
25 agreed it was not going to be calling any experts, and so there

1 will be no expert reports and no expert discovery.

2 The last gesture towards settlement was a letter that
3 I wrote, about a seven-page letter, to Mr. Garber, that I
4 e-mailed to him on the 23rd of December, explaining my views of
5 major issues in the case, and inviting him to call me to
6 discuss a resolution. And that's kind of where it stands.

7 The other relevant piece of information, from my
8 perspective, Your Honor, is whatever else may happen, I'm going
9 to be out of the country in Morocco from the 16th to the 31st.

10 THE COURT: January 16th through the 31st?

11 MR. LEWIS: Correct, Your Honor.

12 THE COURT: Can we come with you?

13 MR. LEWIS: Pardon me?

14 THE COURT: Can we come with you?

15 MR. LEWIS: I would love to have you all come with me.
16 I understand it's a wonderful trip, from the people I know who
17 have made it.

18 THE COURT: Is this vacation, I hope?

19 MR. LEWIS: It is vacation.

20 THE COURT: Okay. No, I hope you have a nice trip.
21 It's a country that I would very much like to visit at some
22 point.

23 MR. LEWIS: Well, when the appropriate time comes, I
24 will certainly fill you in on what we experienced.

25 THE COURT: Okay. All right. Anything else you want

1 to add, at this point, Mr. Lewis?

2 MR. LEWIS: I think Mr. Garber may have an issue on
3 discovery, but I'll let him speak for himself on that.

4 THE COURT: Okay. I was going to turn to Mr. Garber
5 next, so go ahead, Mr. Garber.

6 MR. GARBER: Yes. Yes, Your Honor, we do have an
7 issue. We have filed interrogatories asking the names of the
8 people who worked on this foreclosure and who made the decision
9 to foreclose. One of the defenses that ResCap is making is, as
10 I understand it, they never received a copy of the qualified
11 written request that the Macks sent out in 2009. And I want to
12 find out who dealt with this at their facility -- I think it
13 was in Fort Washington in Pennsylvania -- so I can know what
14 the motive would be or what their reasoning would be behind not
15 being very careful to attend to that qualified written request.

16 I sent out those interrogatories probably sometime in
17 late September or early October, and I raised this issue with
18 the Court at our case management conference. I think that was
19 done somewhere near the end of October, about the 29th. And at
20 that time, Mr. Lewis was requesting back records, even before
21 the qualified written request, on Mrs. Mack, concerning her
22 health. And I raised the issue that we wanted information
23 concerning the lead-up to the foreclosure and the handling of
24 the foreclosure.

25 And it was my understanding that the Court, at that

1 time, said that Mr. Lewis would have a right to get back
2 information about Mrs. Mack, even before she sent out her
3 qualified written request, and to the same extent, the Macks
4 would have a right to get information about leading up to the
5 foreclosure. We have not taken any depositions. We've never
6 been given the name of anybody that has any of this
7 information. The interrogatories were all objected to and were
8 not otherwise answered.

9 And so we feel like we haven't done any discovery at
10 all. I thought that after the Court gave its opinion, on the
11 29th -- I believe that was 29th of October -- that that
12 information would be forthcoming, but it never has.

13 And do I need to file a motion to compel?

14 THE COURT: I don't allow motions, so we'll resolve
15 that one easily. And when I say I don't allow discovery
16 motions, I resolve them without motions, Mr. Garber.

17 Let me hear from Mr. -- have you finished, Mr. Garber?
18 I'm sorry.

19 MR. GARBER: No, Your Honor, that's all.

20 THE COURT: Okay. Mr. Lewis, do you want to respond
21 to that?

22 MR. LEWIS: Yeah, Adam Lewis for the Trust.

23 Your Honor, I think it's important to get a complete
24 picture of the timing here. The Court entered its scheduling
25 order on the 27th of August. Mr. Garber sent out his

1 interrogatories in mid-October. Our responses weren't even due
2 until mid-November. In fact, we served them in a timely
3 fashion on the 17th of November.

4 Mr. Garber has not raised the issue he now raises
5 since that time, since he received our responses, has only just
6 raised them through a letter to me last Friday afternoon, long
7 after discovery closed, and knowing that the Court, right from
8 the start, invited the parties to promptly apply to it for a
9 resolution of any disagreements, given the short discovery
10 schedule, four months. The Court, as it has today indicated,
11 would generally deal with things fairly summarily.

12 So from my perspective, just on a procedural basis, I
13 think Mr. Garber has slept on his rights, and it's a little
14 late to be wanting to get into discovery now on the merits,
15 Your Honor. There's a big difference between comparing Mrs.
16 Mack's health before and after the QWR episode, and the
17 foreclosure and the QWR, which are essentially totally
18 unrelated --

19 THE COURT: May I ask --

20 MR. LEWIS: -- except --

21 THE COURT: I don't want to get in -- look, Mr. Lewis,
22 I'm not resolving this on the basis of whether you asked for
23 and got responses about Mrs. Mack's health before or after any
24 particular time. I don't trade off one discovery issue against
25 another discovery issue.

1 What's your objection to providing the information
2 that Mr. Garber asked for?

3 MR. LEWIS: Well, Your Honor, let me answer that in
4 two pieces, if I may. The first would be my objection, as
5 such, and the second would be to tell you what I know about
6 what the answers would be if we had to give them.

7 My objection is I think that the discovery that Mr.
8 Garber asked for was far afield, and I was not anxious to
9 encourage him to be asking for a lot of material that I think
10 is totally irrelevant to the issues before this Court. And by
11 the way, I didn't think of the Court as trading off one issue
12 against the other. Mr. Garber tried to relate the fact that we
13 got pre-QWR medical information to the idea that he should get
14 pre-QWR foreclosure information. I think that's a total non
15 sequitur.

16 THE COURT: Well --

17 MR. LEWIS: In any case --

18 THE COURT: You know, Mr. Lewis, I plan to resolve the
19 issues on the merits, and it seems to me -- look, discovery and
20 admissibility at trial are two different things, so I don't
21 decide admissibility at trial, relevance for trial at this
22 stage. But it does seem to me that Mr. Garber asking for
23 information about ResCap's decision to proceed with
24 foreclosure, who was involved, the timing of who -- who made
25 the decision and when, is an appropriate subject for discovery.

1 I know, from your letter of December 23, that
2 there's -- one of the issues that you raise is whether the
3 October 26th, 2009 letter from the Macks to GMAC can qualify as
4 a qualified written request. And I certainly understand that.
5 I'm sure we'll get to your request for a summary judgment
6 motion. But how quickly can you --

7 I'm, A, surprised, Mr. Garber, that you waited until
8 now to raise this issue with me. It sounds like this has been
9 an issue that you've known about since mid-Decem -- mid-
10 November, when Mr. Lewis responded. And here we are in mid-
11 January, with discovery closed.

12 So I would take slight umbrage with Mr. Lewis'
13 suggestion that I summarily deal with discovery; I deal with it
14 in what I consider a very considered and careful way; I just do
15 it without a lot of paper and expense for each side to incur in
16 doing it.

17 So why did you wait until now, Mr. Garber, to raise
18 the issue?

19 MR. GARBER: Your Honor, I thought that the matter had
20 been resolved by the Court in October, and I thought that the
21 information would be forthcoming. I know Mr. Lewis and I have
22 had some telephone conversations over this issue, and I just
23 assumed he would give me the information. I don't know the
24 names of people to ask for their deposition; I have to get that
25 information from him.

1 THE COURT: Well, but your time to take depositions is
2 closed. I mean, it's one thing if you believe you were
3 entitled to receive interrogatory answers when there was a
4 cutoff of fact discovery. If you were planning to take any
5 depositions and you had interrogatories seeking to identify
6 potential witnesses, it was incumbent on you to get the
7 information before so that you could take any deposition you
8 wanted to take before discovery.

9 Not only do you want answers to the interrogatories,
10 but the next thing I'm going to hear is you want to take
11 somebody's deposition that -- which is clear as day your time
12 to take discovery has expired. Why do you think --

13 MR. GARBER: Your Honor, I will be --

14 THE COURT: Go ahead, I'm sorry.

15 MR. GARBER: Yes, Your Honor, that is true; I would
16 want to take depositions, because just the names themselves
17 would do nothing for me, which is what I've asked for, the
18 names.

19 THE COURT: I'm not really --

20 MR. LEWIS: Your Honor, it's Adam Lewis.

21 THE COURT: No, stop, Mr. Lewis.

22 MR. LEWIS: No, I just --

23 THE COURT: Mr. Lewis, stop.

24 MR. LEWIS: I'm sorry.

25 THE COURT: Stop.

1 I'm not reopening discovery. I mean, it's as simple
2 as that. I mean, I set cutoffs of fact discovery; it's very
3 clear what it means.

4 On the other hand, Mr. Lewis, I'm not particularly
5 happy hearing today that you didn't provide a response to what
6 seems to me a pretty simple and straightforward question.

7 Did you produce the servicing notes to Mr. Garber?

8 MR. LEWIS: Yes, Mr. Garber has the servicing notes
9 from two sources, from the earlier litigation and from us.

10 THE COURT: And do the servicing notes reveal who was
11 involved in the decision to --

12 MR. LEWIS: No, Your Honor.

13 THE COURT: -- proceed with the foreclosure?

14 MR. LEWIS: Let me explain how I understand things
15 work, because I don't think there's going to be a name. It's
16 my understanding that the way things worked was the following.
17 The process was essentially -- of initiating a foreclosure was
18 essentially automated. That is to say, in their system, they
19 would enter various pieces of information, or the fact that
20 certain information had not been entered by a certain deadline
21 would be noted by the system as well, for example, if the
22 payment weren't made by a particular date.

23 In those cases -- in some cases, those bits of
24 information would come together, so to speak, to create a
25 profile that would mean that a foreclosure should be initiated.

1 The system would then send a signal to someone who is called a
2 teller. Why called a teller, I don't know. And that person
3 would just enter a signal into the system to begin a
4 foreclosure. So --

5 THE COURT: Who hired --

6 MR. LEWIS: -- there's not --

7 THE COURT: Who hired Stern?

8 MR. LEWIS: That I don't know off the top of my head.

9 THE COURT: I mean, a computer can't --

10 MR. LEWIS: But whoever hired Stern hired Stern after
11 the foreclosure -- the decision to make the foreclosure was
12 begun -- was made.

13 THE COURT: Yeah, but I mean, somebody had to make a
14 decision to hire Stern.

15 MR. LEWIS: I'm sure that's true, but that, once
16 again, would have been after the system initiated the
17 foreclosure process. My understanding, and I've talked with
18 the people again today, in anticipation of this call, is that's
19 how it worked. It was automated; there were some quality
20 controls. I don't yet know what went wrong in this instance,
21 whether someone mistakenly entered something or failed to enter
22 something or whatever it was that triggered a foreclosure
23 signal that shouldn't have been triggered. But there is no
24 specific person who made the decision to start the foreclosure.
25 It was a process -- basically a computerized process which, in

1 part, depended on the entry of correct information by people at
2 various points, and once those pieces of information created a
3 certain profile, the system signaled a foreclosure.

4 That's my understanding of how it worked. So there
5 would be no specific person. We have a teller number for the
6 person who entered the actual final instruction, but that
7 person was just following protocol from the computer system.
8 That's my understanding.

9 And again, the reason I was not anxious to provide
10 this information is it seemed to me to be very far afield, not
11 even reasonably calculated to lead to the discovery of
12 admissible evidence. And so I was trying to keep discovery
13 under control and costs under control. And --

14 THE COURT: Well --

15 MR. LEWIS: -- as --

16 THE COURT: -- let -- I'm going to resolve this
17 discovery dispute by requiring, Mr. Lewis, that you respond to
18 the interrogatory.

19 I'm not reopening disc -- I don't know how much good
20 it's going to do you, Mr. Garber, because I'm not reopening
21 discovery for depositions. But I'm going to direct Mr. Lewis
22 to respond to that interrogatory. I'm overruling the objection
23 to the interrogatory.

24 How quickly can you provide a response, Mr. Lewis?

25 MR. LEWIS: Well, Your Honor, certainly before the end

1 of this week, because I'm gone.

2 THE COURT: Okay.

3 MR. LEWIS: Probably in the next day or two. I just
4 want to --

5 THE COURT: Well, you know you --

6 MR. LEWIS: I just want to confirm something; I don't
7 want to be giving bad information.

8 THE COURT: Okay. Look, you --

9 MR. LEWIS: I just want to confirm something, and once
10 I do that, I'll be able to respond to it.

11 THE COURT: You may be gone --

12 MR. LEWIS: I can respond to it --

13 THE COURT: -- in Morocco, but there are a lot of
14 Morrison & Foerster lawyers who aren't going with you.

15 MR. LEWIS: Yeah, but I'm the one who knows about this
16 case. Yeah, I'm sure there are.

17 But one other quick thing, Your Honor, if I may, when
18 I said "summarily", I didn't mean carelessly; I meant --

19 THE COURT: Oh, Mr. --

20 MR. LEWIS: -- like a summary procedure.

21 THE COURT: Mr. Lewis, that's the disadvantage of
22 being on the phone; you can't see me smile when I say it.

23 MR. LEWIS: Yeah, well, I would have flown to New York
24 to see that.

25 THE COURT: No, I -- so don't take it personally. I

1 was --

2 MR. LEWIS: I just don't ever want to offend the
3 Court. I actually admire the way --

4 THE COURT: I --

5 MR. LEWIS: -- the Court handles things.

6 THE COURT: I should follow the advice of avoiding
7 humor.

8 MR. LEWIS: No, humor's important.

9 MR. GARBER: Your Honor, may I ask Mr. Lewis a
10 question about the foreclosure issue?

11 THE COURT: Sure, go ahead.

12 MR. GARBER: The question would be this. As I
13 understand it, the computer takes certain guidelines in and
14 spits out the instructions to foreclose. Is that what you just
15 said, Mr. Lewis?

16 MR. LEWIS: Essentially. People enter things or don't
17 enter things into the computer, along the way, for a particular
18 account. At some point, in some cases, the entries add up to
19 something that fits some kind of a profile, which I certainly
20 can't specify for you, that indicates a foreclosure should be
21 begun, and so the computer generates a signal which then goes
22 to the teller who then enters something in the system.

23 But it's not a -- it's not -- the human-made decisions
24 are probably what the profile looks like, what should be
25 entered into the system in terms of categories, but it's not a

1 human decision to actually begin the foreclosure. It's a human
2 decision --

3 MR. GARBER: So if --

4 MR. LEWIS: -- which lawyer to pick, I suppose.

5 MR. GARBER: Right. But in the Macks' case, they had
6 made all their payments.

7 MR. LEWIS: I understand; I can't --

8 MR. GARBER: So what factors --

9 MR. LEWIS: I can't tell you what went wrong, Mr.
10 Garber. I think I indicated that a little bit earlier.
11 Obviously, something did go wrong. Somebody either didn't
12 enter something in a timely fashion or made a mistake in entry
13 or something like that, and so the profile got filled out, so
14 to speak, when it shouldn't have been.

15 THE COURT: All right. So look, here's what's going
16 to -- with respect to this issue, I'm directing that the
17 outstanding interrogatory -- I don't know whether it's one or
18 more than one interrogatory in this issue -- that the Trust
19 respond to the interrogatory by Friday at 5 p.m., San Francisco
20 time, so -- and hopefully you can do it before then.

21 But I'm not reopening deposition discovery, so I don't
22 know -- look, it's been undisputed all along that an error,
23 perhaps a grievous error, was made when this foreclosure was
24 initiated, because the Macks were not in default. It happened.

25 But so I'm directing, Mr. Lewis, that you respond to

1 the interrogatory, not with the objection, with information, by
2 Friday at 5 or get --

3 MR. LEWIS: I'll do that, Your Honor.

4 THE COURT: -- or get one of your colleagues to take
5 care of it for you.

6 All right. Mr. Garber, other than this issue, have
7 you completed all of your discovery?

8 MR. GARBER: Your Honor, yes; the answer would be yes.
9 We already have a great deal of information from the motions
10 that were raised in the previous case and depositions. So it's
11 not that we don't have any information.

12 THE COURT: Sure.

13 MR. GARBER: We have a lot of information.

14 THE COURT: Sure. Okay. Now, let me ask, I have Mr.
15 Lewis' December 23rd letter in front of me; I'm sure you've
16 reviewed it, Mr. Garber. Do you want to tell me what your
17 position is?

18 MR. GARBER: Your Honor, he -- you're referring to the
19 request for consideration of summary judgment based on two
20 issues?

21 THE COURT: Yes, correct.

22 MR. GARBER: The first issue has to do with whether or
23 not punitive damages would be allowed, and I thought that we've
24 already discussed that, and it would be -- I do not anticipate
25 that the Macks would provide any significant opposition to

1 that, not that they would just agree to it, but I think there
2 is no good law, that the Macks are aware of, that could
3 reasonably persuade the judge not to enter summary judgment on
4 that point.

5 With respect to the second issue --

6 THE COURT: And then --

7 MR. GARBER: -- the second issue is whether this --

8 THE COURT: Let me stop you just to deal --

9 MR. GARBER: -- is what --

10 THE COURT: I want -- look, in one of the ResCap
11 matters -- and it's cited in Mr. Garb -- excuse me, in Mr.
12 Lewis' letter -- I had already, in one matter, the Reed matter,
13 precluded punitive damages. Mr. Lewis cites a lot of authority
14 about it. Is it -- may I -- let me ask you this. I'm trying
15 to avoid unnecessary papers from either side; do you have any
16 objection to my considering Mr. Lewis' December 23rd letter as
17 a motion for partial summary judgment to preclude a claim for
18 punitive damages?

19 MR. GARBER: No, Your Honor, I would have no objection
20 to that.

21 THE COURT: Do you plan to file a response to it, or
22 are you just going to stand on what you've told me today?

23 MR. GARBER: Your Honor, if I filed a response, it
24 would be pro forma, because I have looked into this issue, and
25 I believe that Mr. Lewis has cited the applicable law. And I

1 understand the reasoning of those courts; whether I might like
2 it or agree with it, I understand the reasoning of those
3 courts.

4 THE COURT: All right. Then unless you want time to
5 put something in writing, I'm prepared to rule now, basically,
6 granting partial summary judgment to preclude an award of
7 punitive damages. If you want to file something, I'll give you
8 a chance to do that, but I'm not sure that it's worth your time
9 or effort to do that.

10 MR. GARBER: I don't think I would have anything
11 significant --

12 THE COURT: Okay.

13 MR. GARBER: -- for the Court.

14 THE COURT: All right. So I'll just -- this is on the
15 record today, so I'm not going to enter a separate written
16 order. I'll just so order the transcript that treating the
17 December 23, 2014 letter from Mr. Lewis on the issue of partial
18 summary judgment, precluding an award of punitive damages to
19 the Macks, that's granted, for the reasons and on the
20 authorities set forth in Mr. Lewis' letter.

21 But now, go ahead, Mr. Garber, and address the second
22 issue about the QWR.

23 MR. GARBER: The second issue is whether or not the
24 Macks' letter of October 26th, 2009, would qualified as a
25 qualified written request under RESPA. And Mr. Lewis has cited

1 a case, a Second Circuit case, in which a lawyer sent several
2 communications to the bank, in that case Citibank, sent several
3 communications to them, and said they were qualified written
4 requests, but he didn't use the address that the bank had
5 indicated on their correspondence to the debtor that should be
6 used. And because of that, the Court found it was proper, on
7 that grounds, among other grounds, to not count those letters
8 to be qualified written requests.

9 Now, in our case, we believe the facts are going to be
10 different, therefore, we would oppose a summary judgment that
11 the Macks' letter of October 26th was not a qualified written
12 request. And I can go into more detail in writing, but
13 basically, the Macks were instructed that if they had any
14 correspondence about their account, they should send it to the
15 address that they used.

16 The basis that Mr. Lewis will be going forward on is
17 that in the monthly billing statements there is a list of many
18 different addresses on the back of the bill, and it has an
19 address they should use for what they call general inquiries,
20 one for insurance policies, one for tax bills, one for tax
21 bills and PA, and then it has a paragraph called qualified
22 written request. And it says, under RESPA, a qualified written
23 request must be sent only to this address, and it's P.O. Box
24 1330 Waterloo, Iowa, with a zip code. Now, the Macks did not
25 send it to that P.O. Box; they sent it to P.O. Box 4622 in

1 Waterloo, Iowa, the same place but a different post office box,
2 believing they were making a general inquiry.

3 We don't believe that the facts of the Citibank case,
4 that was cited by Mr. Lewis, are the same as the facts that we
5 have here, and therefore we don't believe that -- RESPA does
6 not say that you have to use a certain address -- we don't
7 believe that the import of that case should apply to our case.
8 So we will oppose --

9 THE COURT: Well, let --

10 MR. GARBER: -- a summary judgment --

11 THE COURT: -- let --

12 MR. GARBER: -- against the Macks.

13 THE COURT: I think I can resolve this issue today, so
14 I'm going to treat Mr. Lewis' December 23rd, 2014 letter as a
15 motion for partial summary judgment on the issue described with
16 respect to whether the October 26, 2009 letter from the Macks
17 can qualify as a qualified written request under 12 U.S.C.,
18 Section 2605(e). I'm going to treat the letter as a motion for
19 partial summary judgment. I'm going to deny it without
20 prejudice. I will consider this issue at the time of trial of
21 the matter. So I don't want -- and that's going to be the
22 Court's disposition.

23 I don't need to get a written response from you, Mr.
24 Garber. So --

25 MR. GARBER: Thank you, Your Honor.

1 THE COURT: -- my question to both of you is when are
2 you going to be ready to go to trial?

3 Mr. Garber, I think the last time we spoke you had
4 indicated you didn't -- and you both told me today you don't --
5 neither side is going to have an expert. I assume you're going
6 to call Mr. Mack. Do you have other witnesses you're going to
7 call, Mr. Garber?

8 MR. GARBER: Yes, Your Honor, we anticipate calling
9 Mr. Mack and his sister-in-law. His sister-in-law was the one
10 that did a lot of the work. Her deposition was taken.

11 Additionally, there was a Dr. Leech (sic) -- or Dr.
12 Leachy (ph.), I guess his name was, and we didn't take his
13 deposition but we agreed that his records, including his
14 letters, would be admissible to the Court, and stand in place
15 instead of anything that he might testify to.

16 We have been attempting to get a social worker in New
17 Jersey, who worked with Mrs. Mack while she was under hospice
18 care. And so far, that person has refused to answer calls, and
19 we do not have an address to send a subpoena to, to get her, or
20 we haven't been able to get one yet. But we would like to
21 still work on that and make sure we get that information to Mr.
22 Lewis. I think we still have sixty days on the expert aspect.

23 THE COURT: Well --

24 MR. LEWIS: Expert?

25 THE COURT: -- let me -- Dr. Leachy -- Mr. Lewis, do

1 you agree that his records will be admitted in evidence --

2 MR. LEWIS: Yes --

3 THE COURT: -- without his testimony?

4 MR. LEWIS: -- in fact, what happened, Your Honor, was
5 I wanted to take Dr. Leachy's deposition in Florida. We
6 finally got him subpoenaed. He was not too anxious to spend
7 time on it. I had a discussion with Mr. Garber about whether
8 we could admit his handwritten records, with a transcript of
9 them that he made, that he, Dr. Leachy, made, along with a kind
10 of a vocabulary of terms, in lieu of taking his deposition.
11 And Mr. Garber agreed. So both of us are going to rely on his
12 records, I think, rather extensively, perhaps, at trial, as
13 speaking for themselves. But he's not going to be appearing as
14 an expert; he's going to be appearing, essentially, as --

15 THE COURT: That's fine.

16 MR. LEWIS: -- as a percipient witness.

17 THE COURT: Let me just -- how many witnesses are
18 going to testify live at trial? So Mr. Mack and his sister-in-
19 law, and Mr. Garber, you're trying to see whether you can find
20 the social worker, is that right?

21 MR. GARBER: Yes, Your Honor. So we would anticipate
22 three. I would tell the Court my clients have told me that the
23 son of Mr. Mack has information. I tried to talk with him. I
24 can't think that he's worthwhile. I've mentioned him also to
25 Mr. Lewis. I don't think Mr. Lewis thinks he's worthwhile

1 either.

2 THE COURT: All right. Mr. Lewis, how many
3 witnesses --

4 MR. LEWIS: Yeah, I agree with that, Your Honor.

5 THE COURT: How many witnesses do you intend to call,
6 Mr. Lewis?

7 MR. LEWIS: At the moment, I'm thinking just one, and
8 the one would be on the QWR address issue, to establish that
9 this address, on the back of each and every account statement,
10 was on the back of each and every of their packets at the time,
11 and I have a few sample statements from the months after the
12 month at issue. And everything else, I think, is going to be
13 pretty much deposition testimony and medical records, which we
14 also agreed would be generally admissible --

15 THE COURT: Right. How many depositions have been
16 take --

17 MR. LEWIS: -- including the med --

18 THE COURT: How many depositions have been taken?

19 MR. LEWIS: In this particular proceeding?

20 THE COURT: Yes.

21 MR. LEWIS: Only two, Your Honor. I took Mr. Mack's
22 and his sister-in-law.

23 MR. GARBER: Your Honor, we took about eight
24 depositions in the proceedings that were in the court down here
25 in Florida. And the two most important ones, that I would want

1 to introduce, are the deposition of Mrs. Mack, and she is
2 videotaped, so you can actually see her. Mr. Mack's deposition
3 was also taken, but he'll be at trial, so I don't anticipate
4 we'll use that.

5 THE COURT: Okay. And --

6 MR. LEWIS: Your Honor, I would anticipate using
7 material from both Mrs. Mack's deposition and from Mr. Mack's
8 deposition. There's a lot of very useful stuff in it.

9 THE COURT: Okay. Mr. Lewis, I take it from what
10 you've just said you're not -- well, let me ask, are you going
11 to have an objection to Mr. Garber offering, and the Court
12 admitting, Mrs. Mack's state court deposition?

13 MR. LEWIS: In principle, no, Your Honor. There may
14 be specific passages, depending on what they're being offered
15 for, but I'm sure we can clear that in advance, or most of it
16 in advance.

17 THE COURT: Okay. So --

18 MR. LEWIS: I won't be objecting simply on the basis
19 that she's not present.

20 THE COURT: Yeah, well, that's for sure.

21 MR. LEWIS: Yeah.

22 THE COURT: If you both look at the Court's Web site,
23 under my chambers' rules, you will see a template for a joint
24 pre-trial conference order. While this is not an adversary
25 proceeding -- it's a claim objection -- I also utilize that

1 template for contested matters on claim objections. And so I
2 would ask that the two of you confer and complete the joint
3 pre-trial conference order. It includes the usual stuff. You
4 need your exhibit lists and identify witnesses and -- so you're
5 going to be away, Mr. Lewis, for about half of this month.
6 That's fine with me. What I would like the two of you to do is
7 discuss and see if you can agree on -- take a look -- Mr.
8 Garber, look at the Web site and pull down the pre-trial
9 conference order; I don't think any of it is going to be a
10 surprise to you.

11 And I'd like one of you to advise my chambers of a
12 reasonable period when you believe you can lodge with the Court
13 a completed proposed joint pre-trial conference order. What I
14 generally require is that all exhibits be pre-marked. Here the
15 claimant, Mr. Mack, will use numbers, and the Trust will use
16 letters. Every exhibit has to have a unique identifier. They
17 all need to be pre-marked. We don't have a reporter who stamps
18 exhibits in the courtroom. You submit them all a week in
19 advance of the trial. You need to identify whether there are
20 any objections to exhibits and what -- because I try to resolve
21 those before we actually begin taking testimony. And I would
22 like pre-trial memoranda of law that address the claims and
23 defenses that each of you are asserting. And again, I like to
24 get all of that, the exhibits, your trial briefs a week before
25 the trial.

1 I'm prepared to schedule -- given the very few
2 witnesses, and I anticipate you'll agree on admissibility of
3 exhibits, it sounds like we're talking about a day, or at most
4 two-day trial. And I will give you a trial date pretty
5 quickly. So you -- the two of you ought to give me -- because
6 you're both out of town, and I'm sure neither of you is
7 particularly thrilled about having a trial in New York in the
8 winter, but that's what's going to happen.

9 So you ought to confer, in your respective schedules,
10 and then you talk with one of my law clerks and we'll try and
11 firm up dates for a trial. And we'll do a final pre-trial
12 conference hearing, which we can -- again, I think we can do it
13 by telephone. I mean, you've been agreeing on most everything,
14 so I don't anticipate that you need to show up in the courtroom
15 for the hearing. We can do it by telephone.

16 But I'd like, in the first instance, the two ought to
17 confer as to when you can submit the joint pre-trial conference
18 order, when you want to have a telephonic joint final pre-trial
19 conference, and give us some dates when the two of you would be
20 available, two consecutive days when you'd be available for
21 trial. Is that workable?

22 MR. LEWIS: Yes, Your Honor. May I ask a question
23 about the Court's procedure at trial?

24 THE COURT: Sure.

25 MR. LEWIS: Obviously, from what we've been talking

1 about, a lot of material is going to be documentary, and
2 deposition transcripts, and apparently videotaped transcripts
3 as well. Does the Court have the parties read those
4 transcripts into the record and -- or are we just going to
5 submit material on top of live testimony? I'm just trying to
6 determine, in terms of planning.

7 THE COURT: Absolutely a fair question. My general
8 practice is not to have a responsive reading of deposition
9 transcripts in the courtroom. So you would submit the
10 transcripts, and it sounds like, what, there's a video
11 deposition of Mrs. Mack. You'd submit it in advance. I will
12 have read and reviewed, in advance; unless one of you believes
13 that it should be -- I should watch a video from the bench,
14 with you both in the courtroom, I would ordinarily not do that.
15 And it would be helpful if you could submit the deposition on a
16 DVD, rather than in videotape, because then I can watch it on
17 my computer.

18 MR. LEWIS: Well, it sounds like it's kind of a
19 combination of live testimony and summary judgment.

20 THE COURT: Well, whatever witnesses you're going to
21 put on live we'll do in the courtroom, and you'll cross-
22 examine --

23 MR. LEWIS: Yep.

24 THE COURT: -- in the courtroom. And --

25 MR. LEWIS: Right.

1 THE COURT: -- anything that's in the deposition
2 transcript, I'll take it and read it and will have read it
3 before you come to trial.

4 MR. LEWIS: Very well, Your Honor. Thank you.

5 THE COURT: Mr. Garber, is that an acceptable
6 approach?

7 MR. LEWIS: Thank you, Your Honor.

8 THE COURT: Okay.

9 MR. GARBER: Yes, Your Honor, that is acceptable.

10 And to just throw out a date, I know Mr. Lewis is
11 leaving shortly on his trip -- do you think we could do that
12 pre-trial order by the 15th of February? Is that --

13 MR. LEWIS: Well --

14 MR. GARBER: -- too soon?

15 MR. LEWIS: -- Mr. Garber, I need to see what's in it
16 before I can respond, but you can def -- I'm willing to do it
17 just as fast as reasonably possible.

18 THE COURT: Well, let me suggest this.

19 MR. GARBER: We'd like to take this --

20 THE COURT: Let me suggest this. The two of you talk
21 offline, today or tomorrow, go look at my pre-trial conference
22 order, talk about it, see when -- and you can -- if you agree
23 on dates, contact one of my law clerks, and we'll work out --
24 within reason. Look, I want to move this one and get this
25 resolved for Mr. Mack and for the Trust. I also want to be

1 reasonable to both of you. So why don't the two of you confer,
2 see if you can work out the dates. If you can't, contact one
3 of my law clerks and, in all likelihood, I'll agree.

4 MR. LEWIS: Yes, Your Honor.

5 MR. GARBER: Thank you, Your Honor.

6 MR. LEWIS: Thank you very much.

7 THE COURT: Okay. Thanks very much both of you.

8 All right. We're adjourned.

9 (Whereupon these proceedings were concluded at 4:41 PM)

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I N D E X

RULINGS

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Mr. Lewis' December 23, 2014 request for	20	15
partial summary judgment precluding an award		
of punitive damages to the Macks is granted		
Mr. Lewis' December 23, 2014 request for	22	14
partial summary judgment regarding whether		
the Macks' October 26, 2009 letter was		
a qualified written request is denied		
without prejudice		

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sharona Shapiro

SHARONA SHAPIRO

AAERT Certified Electronic Transcriber CET**D 492

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Date: January 13, 2015